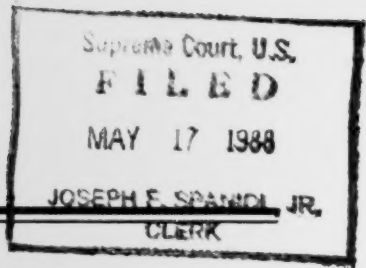


No. 87-1546



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

JOHN MELCHER, MEMBER, UNITED STATES SENATE,  
*Petitioner*

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,  
*Respondents*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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## TABLE OF AUTHORITIES

<i>Case:</i>	<i>Page</i>
<i>Warth v. Seldin</i> , 422 U.S. 490, 501 (1975) .....	2



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Contrary to the implication of Respondent's statement of the question presented, Senator Melcher's complaint did not "alleg[e] that the Act of Congress governing the selection of certain members of the Federal Open Market Committee violates the Appointments Clause." What he did allege—the full text of his complaint is annexed as an appendix to this Reply—is that those members elected in accordance with the procedure in question may not constitutionally exercise the right to vote in or act as chairman of the Committee. The Reserve bank representatives have other important duties in no way challenged in this suit. As the chief executive officers of the regional banks, they are in a position to bring to the Committee

first-hand knowledge of conditions in their respective districts. With a statutory right to present their views at the very time that decision-making deliberations are being conducted, they are in a position to do so with vastly greater effectiveness than if their presence at these deliberations were a matter of grace.

Throughout their Brief, Respondents fail to make the crucial distinction between an Act which mandates a constitutional violation, and one which has merely been interpreted or applied to allow such a violation. Nowhere does the statute involved in this suit contain any provision respecting the voting rights of the members of the FOMC.<sup>1</sup> Nowhere in the complaint is there any claim that the statute is unconstitutional, much less a demand for a judicial determination to that effect. Such a demand can be manufactured only by construing the complaint *against* Senator Melcher, in direct violation of the well-established rule that—

For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.<sup>2</sup>

Thus, even if one assumes, contrary to traditional constitutional theory, that a party injured by conduct pursuant to an unconstitutional Act has a quarrel with the legislature, no such quarrel can be made to appear in the case at bar unless the complaint is construed as alleging that the statute itself, rather than the conduct of which the plaintiff complains, raises the constitutional question which the plaintiff seeks to have adjudicated. Thus the Respondents argue in effect that the trial and reviewing courts should first assume that the statute is unconstitu-

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<sup>1</sup> The full text of section 12A of the Federal Reserve Act is set forth on pages 3 and 4 of the Petition.

<sup>2</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

tional, and then make that very assumption the basis for a denial of any judicial examination of whether the conduct of the defendants transgresses the Constitution, a denial which has the same practical effect as a ruling that their conduct is *not* unconstitutional. Seen in this light, it becomes clear that equitable discretion is simply an intellectual ruse to circumvent one of the key elements of the doctrine of standing laid down by this Court.

Respectfully submitted,

GRASTY CREWS, II

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# **APPENDIX**

KICHISSA

**APPENDIX**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 84-1335

HONORABLE JOHN MELCHER,  
Member, United States Senate  
730 Hart Building  
Washington, D.C. 20510

*Plaintiff,*

v.

FEDERAL OPEN MARKET COMMITTEE,

ANTHONY M. SOLOMON, Member,  
Federal Open Market Committee,

THOMAS M. TIMLEN, Alternate Member,  
Federal Open Market Committee,

EDWARD G. BOEHNE, Member,  
Federal Open Market Committee,

ROBERT P. BLACK, Alternate Member,  
Federal Open Market Committee,

KAREN N. HORN, Member,  
Federal Open Market Committee,

SILAS KEEHN, Alternate Member,  
Federal Open Market Committee,

E. GERALD CORRIGAN, Member,  
Federal Open Market Committee,

JOHN J. BALLE, Alternate Member,  
Federal Open Market Committee,

ROBERT H. BOYKIN, Member,  
Federal Open Market Committee,

ROBERT P. FORRESTAL, Alternate Member,  
Federal Open Market Committee,

*Defendants.*

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[Filed April 30, 1984]

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HAROLD H. GREENE, J.

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## COMPLAINT FOR INJUNCTION

### *General Statement*

This is the complaint of a Member of the United States Senate to enjoin the elected members and alternates of the Federal Open Market Committee from acting as officers of the United States by voting in that Committee or serving as its chairman or vice chairman, and to enjoin that Committee from permitting them so to act, on the ground that their nominations as officers of the United States have never been submitted to the Senate as required by Article II, Section 2, of the Constitution, and their service as such deprives the plaintiff of his right to vote in determining the advice and consent of the Senate to the appointment of officers of the United States.

### *Jurisdiction*

1. This Court has jurisdiction of this action under § 1337 of title 28, United States Code, because it arises under an act regulating commerce, section 12A of the Federal Reserve Act (12 U.S.C. § 263).

2. This Court has jurisdiction of this action under § 1331(a) of title 28, United States Code, as an action brought against an agency of the United States arising under Article II, Section 2, of the Constitution, and section 12A of the Federal Reserve Act (12 U.S.C. § 263).

3. This Court has jurisdiction of this action under § 702 of title 5, United States Code, because the plaintiff is suffering legal wrong because of agency action.

*The Plaintiff*

4. The plaintiff is a Member of the United States Senate, elected by the people of the State of Montana for a term ending January 3, 1989.

*The Federal Open Market Committee*

5. The defendant Federal Open Market Committee is an agency of the United States, created by section 12A of the Federal Reserve Act (12 U.S.C. § 263) to control purchases and sales of securities on the open market by Federal Reserve banks. Its structure and function are more particularly described hereinafter in paragraphs 21 through 25.

*The Reserve Bank Officer Defendants*

6. Each Federal Open Market Committee member and alternate named as a defendant was appointed as an officer of a Federal Reserve bank by the board of directors of such bank, with the approval of the Board of Governors of the Federal Reserve System, for a term ending February 28, 1986, as more particularly set forth in the following table:

Name of Defendant	Position	Federal Reserve Bank
Anthony M. Solomon	President	New York
Thomas M. Timlen	First Vice President	New York
Edward G. Boehne	President	Philadelphia
Robert P. Black	President	Richmond
Karen N. Horn	President	Cleveland
Silas Keehn	President	Chicago
E. Gerald Corrigan	President	Minneapolis
John J. Balles	President	San Francisco
Robert H. Boykin	President	Dallas
Robert P. Forrestal	President	Atlanta

7. The Board of Directors of each Federal Reserve bank consists of nine members. The chairman, deputy chairman, and one other member of each such board of directors are appointed by the Board of Governors of the Federal Reserve System. The other six members of the board of directors of each such bank are elected by the commercial banks which hold the stock of such bank. (Federal Reserve Act, § 4, 12 U.S.C. §§ 302 et seq.)

8. Under the terms of the statute (Federal Reserve Act § 12A; 12 U.S.C. §§ 263(a)), 24 persons, the presidents and first vice presidents of the twelve Federal Reserve banks, are eligible for election to the five positions as Reserve bank representatives, and the five positions as alternates, on the Federal Open Market Committee.

9. No officer or group of officers of the United States has power to direct or control who shall be elected to the Committee from among the persons who by statute are eligible for such election.

10. Each of the Federal Open Market Committee members and alternates named as defendants is serving as such for term ending February 28, 1985, having been elected thereto as follows:

(a) Edward G. Boehne was elected a member, and Robert P. Black an alternate, by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and Richmond.

(b) Anthony M. Solomon was elected a member, and Thomas M. Timlen an alternate, by the board of directors of the Federal Reserve Bank of New York.

(c) Karen N. Horn was elected a member, and Silas Keehn an alternate, by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago.

(d) Robert H. Boykin was elected a member, and Robert P. Forrestal an alternate, by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis.

(e) E. Gerald Corrigan was elected a member, and John J. Balles an alternate, by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco.

11. The defendants have admitted that the defendant individuals are acting as officers of the United States, in that in accordance with the practice of the Federal Open Market Committee, such individuals, in their capacity as members or alternates of the Federal Open Market Committee separate and apart from their capacity as officers of Federal Reserve banks, have taken the oath of office as officers of the United States in accordance with Article VI of the Constitution.

12. The defendant Anthony M. Solomon is serving as vice chairman of the Federal Open Market Committee, and under the Ruels of Organization of the Committee, performs the duties of the chairman in the absence of the chairman.

13. None of the defendant individuals has been appointed to the Federal Open Market Committee by the President, by and with the advice and consent of the Senate, nor do any of them serve on the Committee by virtue of any other office to which they have been so appointed.

14. The functions of the members of the Federal Open Market Committee, as more particularly set forth in paragraphs 21 through 25 of this complaint, go beyond those which may be performed by an inferior officer of the United States.

15. None of the defendant individuals has been appointed to the Federal Open Market Committee by any

of the constitutionally permissible means for the appointment of inferior officers of the United States, nor do any of them serve on the Committee by virtue of any other office to which they have been so appointed.

### *Open Market Operations*

16. The Federal Reserve banks own a substantial portfolio of United States Government securities. For example, their aggregate holdings of such securities in the month of August, 1983, averaged approximately \$146,489,000,000 (Federal Reserve Bulletin, September 1983, page A4).

17. The Federal Reserve Bank of New York, acting for itself and as agent for the other Federal Reserve banks, makes substantial purchases and sales of United States Government securities in the open market.

18. The Federal Reserve Bank of New York, acting for itself and as agent for the other Federal Reserve banks, makes substantial purchases and sales in the open market of foreign currencies or obligations payable in foreign currencies.

19. The open market operations of the Federal Reserve banks have a substantial effect in terms of regulating the value of foreign currencies relative to the currency of the United States.

20. The open market operations of the Federal Reserve banks constitute a major means by which monetary policy affects bank reserves, bank credit, money supply, interest rates, overall credit conditions, investment, employment, and the value of the currency of the United States.

### *Operation of the Federal Open Market Committee*

21. The open market operations of the Federal Reserve banks are by statute subject to the direction and control of the Federal Open Market Committee (Federal



Reserve Act, § 12A(b) ; 12 U.S.C. § 263(b) ), and in fact are conducted subject to and in accordance with such direction and control.

22. The formulation of Federal Reserve System open market policy by the Federal Open Market Committee is and for the foreseeable future will continue to be a substantial and significant element in the determination of overall monetary policy, and as such had and will continue to have a profound effect on the value of the currency of the United States, foreign exchange rates, interest rates, investment, and employment.

23. The Federal Open Market Committee by statute consists of twelve members, of whom seven serve as part of their duties as members of the Board of Governors of the Federal Reserve System, to which they have been appointed by the President by and with the advice and consent of the Senate. The other five are representatives of Federal Reserve banks who have not been so appointed, but who are elected by the boards of directors of such banks (Federal Reserve Act, § 12A; 12 U.S.C. § 263(a) ). The defendant individuals are the five persons currently serving as Federal Reserve bank representatives, and the five persons currently serving as their alternates. The manner in which they became eligible for election to the Committee is described in paragraph 6 of this complaint, and the manner in which they were elected is described in paragraph 10.

24. When attending meetings of the Federal Open Market Committee as members (or as alternates in the absence of members), the defendant individuals serve and vote on the same basis as those whose membership on the Committee is by virtue of the office they hold as members of the Board of Governors of the Federal Reserve System.

25. When voting as members or alternates on the Federal Open Market Committee, the defendant individuals

are not subject to the direction, control, or supervision of any officer of the United States.

*The Injury to the Plaintiff*

26. By acting as officers of the United States when their nominations have never been submitted to the Senate, the defendant individuals deprive the plaintiff of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of officers of the United States.

27. By permitting the defendant individuals to act as officers of the United States when their nominations have never been submitted to the Senate, the Federal Open Market Committee deprives the plaintiff of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of officers of the United States.

*Prayer for Relief*

WHEREFORE, the plaintiff prays that the Court permanently enjoin the defendant individuals, and their successors, as representatives and alternates elected by boards of directors of Federal Reserve banks, from voting in, or serving as chairman or vice chairman of, the Federal Open Market Committee, and that the Court permanently enjoin the Federal Open Market Committee from permitting them so to vote or serve;

And the plaintiff further prays for such other relief as may be just and proper.

Respectfully submitted,

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